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Supreme Court, U.S.
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In The

Supreme Court of the United States

DOUGLAS V. LANE,

Petitioner,

v.

STATE OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a double jeopardy claim may be raised for the first time on appeal where there has been no "knowing" or "intelligent" waiver below, as the majority of federal courts of appeals and state courts have held, which is contrary to the decision of the Pennsylvania courts in this matter and the courts of several other states.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties – Petitioner Douglas V. Lane, and Respondent State of Pennsylvania.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF ALL PARTIES	ii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA	1
OPINIONS BELOW	1
JURISDICTION	1
TEXT OF CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. The Decision Below Implicates an Irreconcilable and Deepening Conflict Among the Federal and State Courts	5
II. The Question Presented Significantly Impacts the Administration of Criminal Justice, Given the Widely Different Views of Constitutional Waiver Which These Conflicting Decisions Represent	12
III. The Present Case Represents a Superb Vehicle for Consideration of the Question Presented	14
CONCLUSION	16

TABLE OF CONTENTS – Continued

Page

APPENDIX

Memorandum of the Superior Court of Pennsylvania ..... App. 1

Order of the Superior Court of Pennsylvania Denying Reargument ..... App. 19

Order of the Supreme Court of Pennsylvania Denying Review ..... App. 20

Portion of First Trial Transcript ..... App. 21

TABLE OF AUTHORITIES

Page

CASES

Bruster v. State, 291 Ga.App. 490, 662 S.E.2d 265 (2008) 7

Clifton v. State, 758 P.2d 1279 (Alaska Ct. App. 1988) 8

Commonwealth v. Hickman, 453 Pa. 427, 309 A.2d 564 (1973) 3

Commonwealth v. Spear, 43 Mass.App.Ct. 583, 686 N.E.2d 1037 (1997) 8

Commonwealth v. White, 476 Pa. 350, 382 A.2d 1205 (1978) 7

Eberenz v. Commonwealth, ___ S.W.3d ___ (Ky.App. 2008) 9

Gomez v. Berge, 434 F.3d 940 (7th Cir. 2006) 6

Head v. State, 146 P.3d 1141 (Okla. Crim. 2006) 10

Jennings v. State, 965 S.2d 1112 (Ala. Crim. App. 2006) 7

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) 13

Nixon v. U.S., 728 A.2d 582 (App. D.C. 1999) 7

People v. Cruthers, 124 P.3d 887 (Colo.App. 2005) 8

People v. Henry, 204 Ill.2d 267, 789 N.E.2d 274 (Ill. 2003) 9

TABLE OF AUTHORITIES – Continued

Page

People v. Madden, 49 A.D.3d 1264, 856 N.Y.S.2d 344 (2008) 10

People v. Scott, 275 Mich.App. 521, 739 N.W.2d 702 (2007) 9

People v. Scott, 83 Cal.App.4th 784, 100 Cal.Rptr.2d 70 (2000) 7

Peretz v. U.S., 501 U.S. 923, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) 13

Schnekcloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) 13

State v. Allah, 170 N.J. 269, 787 A.2d 887 (2002) 10

State v. Anderson, 157 P.3d 809 (Utah Ct. App. 2007) 10

State v. Applewhite, 660 S.E.2d 240 (N.C.App. 2008) 8

State v. Austin, 900 So.2d 867 (La.App. 2005) 9

State v. Cote, 126 N.H. 514, 493 A.2d 1170 (1985) 8

State v. Day, 925 A.2d 962 (R.I. 2007) 10

State v. Dombos, 143 N.M. 668, 180 P.3d 675 (2008) 10

State v. Foust, 105 Ohio.St.3d 137, 823 N.E.2d 836 (2004) 10

State v. Franklin, 130 S.W.3d 789 (Tenn.App. 2003) 10

TABLE OF AUTHORITIES – Continued

Page

State v. Halliburton, 539 N.W.2d 339 (Iowa 1995) 7

State v. Hussain, 143 Idaho 175, 139 P.3d 777 (Idaho App. 2006) 9

State v. Johnson, 245 S.W.3d 288 (Mo. App. 2008) 10

State v. Millanes, 180 Ariz. 418, 885 P.2d 106 (1994) 8

State v. Miyazaki, 64 Haw. 611, 645 P.2d 1340 (1982) 9

State v. Reeves, 144 Wash.App. 422, 182 P.3d 491 (2008) 11

State v. Rice, 348 S.C. 417, 559 S.E.2d 380 (2001) 8

State v. Robinson, 730 A.2d 684 (Me. 1999) 9

State v. Stephen O., 106 Conn.App. 717, 943 A.2d 477 (2008) 8

State v. Walker, 283 Kan. 587, 153 P.3d 1257 (Kan. 2007) 9

State v. Weitzel, 299 Mont. 192, 998 P.2d 1154 (2000) 10

Stephenson v. State, 255 S.W.3d 652 (Tx. Ct. App. 2008) 10

Taylor v. State, 381 Md. 602, 851 A.2d 551 (2004) 7

U.S. v. Bascaro, 742 F.2d 1335 (11th Cir. 1984) 13

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Battle, 289 F.3d 661 (10th Cir. 2002) 6

U.S. v. Bercier, 506 F.3d 625 (8th Cir. 2007) 6

U.S. v. Doyle, 121 F.3d 1078 (7th Cir. 1997) 6

U.S. v. Henry, 519 F.3d 68 (1st Cir. 2008) 6

U.S. v. Hernandez-Guardado, 228 F.3d 1017 (9th Cir. 2000) 6, 14

U.S. v. Jarvis, 7 F.3d 404 (4th Cir. 1993) 6

U.S. v. Lewis, 492 F.3d 1219 (11th Cir. 2007) 13

U.S. v. Miller, 527 F.3d 54 (3rd Cir. 2008) 6

U.S. v. Ogba, 526 F.3d 214 (5th Cir. 2008) 6

U.S. v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) 12, 13, 15

U.S. v. Smith, 532 F.3d 1125 (11th Cir. 2008) 6

U.S. v. Wheeler, 330 F.3d 407 (6th Cir. 2003) 6

U.S. v. White, 240 F.3d 127 (2nd Cir. 2001) 6

Valdes v. State, 970 So.2d 414 (Fla.App. 2007) 9

Wilder v. State, 813 N.E.2d 788 (Ind.App. 2004) 9

Yetter v. State, 987 P.2d 666 (Wyo. 1999) 8

CONSTITUTIONAL AMENDMENTS

U.S. Const. amend. V 2, 3, 11

U.S. Const. amend. XIV 2, 3

TABLE OF AUTHORITIES – Continued

Page

RULES

S.Ct.R. 30 1

F.R.Crim.P. 52(b) 6

STATUTES

28 U.S.C. § 1257(a) 1

OTHER AUTHORITIES

Gabriel J. Chin, *Double Jeopardy Violations as "Plain Error" Under Federal Rule of Criminal Procedure 52(B)*, 21 Pepp. L.Rev. 1161 (1994) 5, 6, 7, 11, 13

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

DOUGLAS V. LANE respectfully petitions this Court for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The decision of the Superior Court of Pennsylvania, the merits of which are at issue in this petition and which is found at App. 1, was filed on June 26, 2007, and is unreported. The Superior Court denied reargument on August 28, 2007. *See*, App. 19. The Pennsylvania Supreme Court's denial of Petitioner's petition for allowance of appeal of the Superior Court's decision is found at App. 20, is unreported, and was filed on April 9, 2008.

JURISDICTION

The Supreme Court of Pennsylvania entered its order on April 9, 2008, *see*, App. 20, denying Petitioner's petition for allowance of appeal from the substantive decision of the Superior Court of Pennsylvania. *See*, App. 1. Justice Souter granted an application to extend the time to file this petition until September 6, 2008, a Saturday. This Petition was thus due on the next business day, September 8, 2008. *See*, S.Ct.R. 30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a), Petitioner having

asserted below and asserting herein a deprivation of rights secured under the United States Constitution.

TEXT OF CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

Amendment V:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

Amendment XIV:

> . . . nor shall any State deprive any person of life liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Petitioner Douglas Lane was charged by criminal information in the Court of Common Pleas of Lackawanna County, Pennsylvania, with numerous counts relating to allegations of improper sexual contact with several adolescent boys. At the close of

Respondent's case in Petitioner's first trial, defense counsel sought judgment of acquittal since no prosecution witness identified Petitioner as the perpetrator of the offenses. *See*, App. 22. The trial court denied this motion, *see* App. 26, but granted Petitioner's unrelated motion for mistrial based on his argument that several of the charges related to activity which allegedly occurred many years past, and were thus barred by the applicable statute of limitations.

Counsel sought to prevent a retrial, alleging that Respondent had engaged in prosecutorial misconduct related to the statute of limitations issue, and invoked the protections of the Fifth Amendment's double jeopardy clause, applicable to the states via the Fourteenth Amendment's due process clause. U.S. Const. amends. V and XIV. With the trial court's denial, a second trial commenced.

What was not raised pretrial, however, was a double jeopardy claim based upon the insufficiency of prosecutorial evidence from the first trial where Petitioner went unidentified. Under Pennsylvania law, this deficiency was fatal to the prosecution's case, *see, e.g., Commonwealth v. Hickman*, 453 Pa. 427, 309 A.2d 564 (1973), but the trial court's rejection during that first trial left appellate review of this issue for another day.

The second jury found Petitioner guilty on most counts, with the trial court imposing a sentence that included an aggregate term of imprisonment of

fourteen years, three months minimum, to thirty years maximum.

With new counsel representing him, Petitioner pursued direct appeal to the Superior Court of Pennsylvania. Among the issues raised at this level was the claim that Respondent's failure to identify Petitioner at his first trial, and thus the insufficiency of evidence against him rendered his conviction and sentence at the second trial violative of his double jeopardy rights. The Superior Court refused to address the merits of this claim. App. 1. Instead, in a footnote, the Court held that the failure to raise this species of double jeopardy at the trial level rendered it "waived." *Id* at fn1.

Petitioner requested reargument in the Superior Court, which was denied. App. 19. With a similar denial of discretionary review by the Pennsylvania Supreme Court, App. 20, Petitioner sought an extension of time from the Hon. David Souter to seek certiorari review, which was granted. *See, Lane v. Pennsylvania*, 08A10 (Application to Extend). This present timely petition follows.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Implicates an Irreconcilable and Deepening Conflict Among the Federal and State Courts

1. The present case provides this Court an opportunity to resolve a deepening split among the federal circuits and state courts on an important question of constitutional law, namely whether the fundamental right to be free from twice being placed in jeopardy can be waived without a knowing and voluntary waiver. The specific factual posture of this case represents a particular context in which this question is most acutely confronted by the courts, and in which this judicial split is most aggravated, namely, whether a double jeopardy claim is waived on appeal if not first argued at the trial level. As the Superior Court held in this case, Pennsylvania is one of those jurisdictions which applies strict waiver in the face of such failure. This, however, is becoming an increasingly minority position.

In his article published nearly fifteen years ago, Prof. Gabriel J. Chin analyzed the almost universal position of the federal courts at that time which mirrored the Superior Court's decision in this case, i.e., that a double jeopardy claim raised for the first time on appeal was not properly preserved, and was thus waived. *See*, Gabriel J. Chin, *Double Jeopardy Violations as "Plain Error" Under Federal Rule of Criminal Procedure 52(B),* 21 Pepp. L.Rev. 1161 (1994). Referring to this as the "rule of waiver," the Chin article chided those various circuits for adhering

to what was "doctrinally insupportable," given the broad power of the federal courts under F.R.Crim.P. 52(b) to correct "plain error" which was not objected to at the lower level. *Id.*

In the near decade and a half since, the position of the federal appeals courts is likewise virtually universal on this issue, but in the exact opposite way to that which Prof. Chin found. *See, U.S. v. Miller*, 527 F.3d 54 (3rd Cir. 2008) ("We review Miller's double jeopardy claim for plain error since he did not raise the issue before the District Court."); *see also, U.S. v. Henry*, 519 F.3d 68 (1st Cir. 2008) (same); *U.S. v. White*, 240 F.3d 127 (2nd Cir. 2001) (same); *U.S. v. Jarvis,* 7 F.3d 404 (4th Cir. 1993) (same); *U.S. v. Ogba*, 526 F.3d 214 (5th Cir. 2008) (same); *U.S. v. Wheeler,* 330 F.3d 407 (6th Cir. 2003) (same); *U.S. v. Doyle,* 121 F.3d 1078 (7th Cir. 1997) (same);[1] *U.S. v. Bercier*, 506 F.3d 625 (8th Cir. 2007) (same); *U.S. v. Hernandez-Guardado,* 228 F.3d 1017 (9th Cir. 2000) (same); *U.S. v. Battle*, 289 F.3d 661 (10th Cir. 2002) (same); *U.S. v. Smith,* 532 F.3d 1125 (11th Cir. 2008) (same).[2]

2. The decision of the Pennsylvania Superior Court in this case, consistent with the published

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[1] *But see, Gomez v. Berge*, 434 F.3d 940 (7th Cir. 2006) ("[D]ouble jeopardy rights may be waived by failing to preserve the issue for appeal.")

[2] The U.S Court of Appeals for the D.C. Circuit has apparently not addressed this issue directly.

holding of the Pennsylvania Supreme Court in another case, *see, e.g., Commonwealth v. White*, 476 Pa. 350, 382 A.2d 1205 (1978), is in direct conflict with the decisions of these federal appeals courts, as well as decisions from courts in other states. The landscape of state cases addressing this issue, however, is not as consistent as it is now at the federal level. In fact, the split among state courts on the question of whether a double jeopardy claim is waived if not raised at trial is at least as deep as that between the federal circuits and the Pennsylvania courts in the present case.

For example, some states, like Pennsylvania, adopt an outright "rule of waiver," *see*, Chin, 21 Pepp. L.Rev. at 1163, when double jeopardy is not first raised in the trial court. *See, e.g., Jennings v. State*, 965 S.2d 1112 (Ala. Crim. App. 2006) (double jeopardy issue "must be preserved for appellate review or it is waived."); *see also, People v. Scott*, 83 Cal.App.4th 784, 100 Cal.Rptr.2d 70 (2000) ("A plea of double jeopardy cannot be raised for the first time on appeal."); *Nixon v. U.S.*, 728 A.2d 582 (App. D.C. 1999) (same); *Bruster v. State*, 291 Ga.App. 490, 662 S.E.2d 265 (2008) ("This court will not consider alleged errors, even those of constitutional dimension [i.e., double jeopardy] unless they were raised and ruled upon in the trial court."); *State v. Halliburton*, 539 N.W.2d 339 (Iowa 1995) ("[W]e will not consider [defendant's] claim of double jeopardy for the first time on appeal."); *Taylor v. State*, 381 Md. 602, 851 A.2d 551 (2004) (double jeopardy issue not preserved

for appellate review if not ruled on by trial court); *Commonwealth v. Spear*, 43 Mass.App.Ct. 583, 686 N.E.2d 1037 (1997) (same); *State v. Cote*, 126 N.H. 514, 493 A.2d 1170 (1985) (double jeopardy may not be raised for the first time on appeal); *State v. Applewhite*, 660 S.E.2d 240 (N.C.App. 2008) ("The failure of a defendant to properly raise the issue of double jeopardy before the trial court precludes reliance on the defense on appeal."); *State v. Rice*, 348 S.C. 417, 559 S.E.2d 380 (2001) ("A claim of double jeopardy is not a question of subject matter jurisdiction and thus may not be raised for the first time on appeal."); *Yetter v. State*, 987 P.2d 666 (Wyo. 1999) ("A criminal defendant waives the defense of double jeopardy if she does not present her double jeopardy argument to the trial court.").

3. The majority of states which have directly addressed this issue, however, are more in line with current federal practice, and either permit full appellate review of a non-preserved double jeopardy claim, or apply some version of the federal "plain error" standard in such cases. *See, e.g., Clifton v. State*, 758 P.2d 1279 (Alaska Ct. App. 1988) ("[D]ouble jeopardy issue may be raised for the first time on appeal without prejudice."); *State v. Millanes*, 180 Ariz. 418, 885 P.2d 106 (1994) (without a "knowing, intelligent, and voluntary waiver" at the trial level, a double jeopardy claim is reviewable on appeal); *People v. Cruthers*, 124 P.3d 887 (Colo.App. 2005) ("We review an unpreserved double jeopardy challenge for plain error."); *State v. Stephen O.*, 106 Conn.App. 717, 943

A.2d 477 (2008) (double jeopardy claim raised on appeal not waived where "record is adequate for review and defendant's claim is of constitutional magnitude."); *Valdes v. State*, 970 So.2d 414 (Fla.App. 2007) ("[A] double jeopardy violation constitutes fundamental error [citation omitted] and a claim of fundamental error may be raised for the first time on direct appeal."); *State v. Miyazaki*, 64 Haw. 611, 645 P.2d 1340 (1982) (double jeopardy is a "substantial right" and may be "noticed although [] not brought to the attention of the court."); *State v. Hussain*, 143 Idaho 175, 139 P.3d 777 (Idaho App. 2006) (while rule requires that double jeopardy be raised below, it will be addressed when raised "for the first time on appeal under the principle of fundamental error."); *People v. Henry*, 204 Ill.2d 267, 789 N.E.2d 274 (Ill. 2003) (plain error review of an unpreserved double jeopardy claim); *Wilder v. State*, 813 N.E.2d 788 (Ind.App. 2004) ("[I]t is well settled that a violation of double jeopardy protections is fundamental error and must be addressed upon appeal *sua sponte*."); *State v. Walker*, 283 Kan. 587, 153 P.3d 1257 (Kan. 2007) ("[D]ouble jeopardy [violation raises] a question of law subject to unlimited review."); *Eberenz v. Commonwealth*, ___ S.W.3d ___ (Ky.App. 2008) ("[F]ailure to object to double jeopardy at trial does not waive the right to raise the issue on appeal."); *State v. Austin*, 900 So.2d 867 (La.App. 2005) (double jeopardy may be raised for first time on appeal); *State v. Robinson*, 730 A.2d 684 (Me. 1999) (same); *People v. Scott*, 275 Mich.App. 521, 739 N.W.2d 702 (2007) ("[U]npreserved double jeopardy challenge [is reviewed] for plain

error."); *State v. Johnson*, 245 S.W.3d 288 (Mo. App. 2008) (unpreserved double jeopardy claim reviewed on appeal if violation evident on face of the record); *State v. Weitzel*, 299 Mont. 192, 998 P.2d 1154 (2000) (unpreserved double jeopardy claim reviewable for plain error on appeal); *State v. Allah*, 170 N.J. 269, 787 A.2d 887 (2002) (while an unpreserved double jeopardy claim is waived on appeal, "the court, for good cause shown [such as a claim of ineffective assistance of counsel] may grant relief from the waiver."); *State v. Dombos*, 143 N.M. 668, 180 P.3d 675 (2008) ("[Defendant] may raise a double jeopardy challenge on appeal, regardless of whether the issue was preserved."); *People v. Madden*, 49 A.D.3d 1264, 856 N.Y.S.2d 344 (2008) (double jeopardy claim not required to be preserved for appellate review); *State v. Foust*, 105 Ohio.St.3d 137, 823 N.E.2d 836 (2004) (unpreserved double jeopardy claim subject to plain error review on appeal); *Head v. State*, 146 P.3d 1141 (Okla. Crim. 2006) (same); *State v. Day*, 925 A.2d 962 (R.I. 2007) (unpreserved double jeopardy claim waived unless good cause shown); *State v. Franklin*, 130 S.W.3d 789 (Tenn.App. 2003) (review granted of unpreserved double jeopardy claim "to correct an error of constitutional dimension and to prevent manifest injustice."); *Stephenson v. State*, 255 S.W.3d 652 (Tx. Ct. App. 2008) (double jeopardy claim not waived if violation apparent on "face of the record and where enforcement of usual rules of procedural default serves no legitimate state interests."); *State v. Anderson*, 157 P.3d 809 (Utah Ct. App. 2007) (double jeopardy raised for first time on appeal reviewed for

"plain error."); *State v. Reeves*, 144 Wash.App. 422, 182 P.3d 491 (2008) (double jeopardy "is a constitutional challenge that may be raised for the first time on appeal.").

4. The rift created by these widely varying approaches to the unpreserved double jeopardy argument serves no legitimate constitutional interest but instead leads to a simmering disrespect for this fundamental principle of Fifth Amendment jurisprudence. While the federal courts of appeals have altered their course since Prof. Chin's article was published, 21 Pepp. L.Rev. 1161, and now grant an exacting but important level of review of such double jeopardy claims, as do the majority of states which have addressed this issue head on, there remains a solid and strong minority of states (like Pennsylvania in this case) which are steadfast in their denial of appellate review of these challenges despite their constitutional import. These states leave defendants, who constitutionally should never have been tried and thus possess an absolute right to dismissal under the Fifth Amendment, with little recourse. In light of this troubling and inconsistent interpretation among the courts, it is essential that this petition be granted so resolution of this conflict may commence.

II. The Question Presented Significantly Impacts the Administration of Criminal Justice, Given the Widely Different Views of Constitutional Waiver Which These Conflicting Decisions Represent

1. The import of this case extends beyond the troubling and vast conflict among the state and federal courts, and attaches to the critical issue of how and when a fundamental constitutional right can be extinguished. As such, its resolution will have a significant impact on the administration of criminal justice given the widely different effects upon double jeopardy appellants in the conflicting jurisdictions.

At its core, the decision of the Superior Court below represents a judicial encroachment on an accused's constitutional liberty without so much as a nod of concurrence from him. As this Court has clearly explained, judicial finding of "waiver" does not merely defer review of a certain claim, it "extinguishes" it altogether. *See, U.S. v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. . . . Mere forfeiture, as opposed to waiver, does not extinguish an error. . . . ") (internal citations omitted).

With the evolution of caselaw in this area, the various circuits have recognized the terminal nature of waiver in this context and its impact on such a

right as fundamental as double jeopardy. For example, the 11th Circuit suggests that the *Olano* holding, and its explanation of the critical difference between waiver and forfeiture, may have prompted the circuits to reconsider their position with regard to the more drastic "rule of waiver" decisions in unpreserved double jeopardy cases. *See, U.S. v. Lewis*, 492 F.3d 1219, 1223 (11th Cir. 2007). Accordingly, in *Lewis*, the Court reversed its prior adherence to the "rule of waiver" and employed "plain error" review in the face of an unpreserved claim where the defendant "took no affirmative step to waive his right against double jeopardy." *Id.*[3]

2. The *Lewis* decision, and the above cited cases like it, pay due respect to this Court's ancient principle that wavier of those fundamental constitutional rights which guarantee a fair trial must be "knowing" and "intelligent." *Schnekcloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *see also, Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). The decision of the

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[3] While this Court has not directly addressed the issues presented in this case, it has, in dicta, recognized the obvious truism that double jeopardy, like other constitutional rights, can be waived. *See, Peretz v. U.S.*, 501 U.S. 923, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991). In so doing, it cites *U.S. v. Bascaro*, 742 F.2d 1335 (11th Cir. 1984), which, at the time, supported the then-prevailing federal view that unpreserved double jeopardy claims were "waived" on appeal. *See,* Chin, *supra*. The decision in *Lewis, supra,* however, recognizes the abrogation of *Bascaro,* leaving the reference to it in *Peretz* of little value.

Pennsylvania Superior Court below abrogates this principle, as do the holdings of those courts with similar views. Petitioner "took no affirmative steps to relinquish his right against double jeopardy." *Hernandez-Guardado, supra.* No colloquy was conducted, nor was there even an implied surrender of these rights. Nonetheless, Petitioner's double jeopardy challenge (based on his assertion that the insufficiency of the evidence presented against him at his first trial render his second trial and conviction constitutionally infirm) has never received judicial review. If the Pennsylvania and similar courts are correct, then this Court's doctrine relating to the "knowing" and "intelligent" waiver of constitutional rights has been grossly misunderstood. Since nothing in our jurisprudence suggests this, it is respectfully suggested that those courts which stubbornly hold to their version of the "rule of wavier" principle, and deny review of double jeopardy claims raised first on appeal, are simply in error. Nothing short of review by this Court at this time will suffice in the face of this misguided interpretation of law.

III. The Present Case Represents a Superb Vehicle for Consideration of the Question Presented

1. The present case presents an excellent opportunity to address the question presented. This is particularly so given that this case arises from a simple, clean record. It is clear from review of the record of the first trial that the prosecution failed to

identify Petitioner as the perpetrator of the offenses for which he was charged. His prior counsel made the appropriate motion which the trial court denied. App. 23-26. After he was convicted at his second trial and sought direct review, he was presented with the opportunity to seek appellate redress of his double jeopardy issue. The Superior Court faced the claim that in light of insufficient evidence at the first trial the second trial was a nullity and thus rendered Petitioner's conviction a violation of his double jeopardy rights, but tersely dismissed it. App. 6, fn. 1.

2. With this dismissal spawning the present petition, the question presented is uncluttered with ancillary matters of record and is available for this Court's review and rectification. Petitioner has the right to have his double jeopardy claim heard, and had he been convicted in federal court or one of the majority of states with similar understanding of the law, he would have the opportunity to argue this "unwaived" constitutional claim. By finding waiver, despite a lack of any affirmative, specific steps on Petitioner's part, or *any* act which could be construed as a "knowing" or "intentional" relinquishment of his double jeopardy rights, the Superior Court of Pennsylvania has now declared those rights "extinguished." *See, Olano, supra.* That Court's decision is simple, and it is either right or wrong, but it stands in such stark contrast to the majority of other courts which have examined similar claims that it provides a ripe opportunity for this Court to declare which side's reasoning is best. Missing this opportunity is to

risk abandonment of a vital constitutional issue to an unsupported legal premise represented in the Superior Court's holding (and in the decisions of like cases). Such a precious and principled liberty as the freedom to be spared twice being placed in jeopardy is imperiled by such a rule. This condition cannot be allowed to endure, and the present case is the vehicle by which its end can be effectuated. Grant of the present petition is imperative.

CONCLUSION

For the foregoing reasons, Petitioner Douglas V. Lane prays that this Court grant his petition for writ of certiorari.

Respectfully submitted,

JOSEPH M. COSGROVE
Counsel of Record
Attorney for Petitioner

Non-Precedential Decision

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 594 MDA 2006
DOUGLAS V. LANE, Appellant	:	

Appeal from the Judgment of Sentence entered October 4, 2005, in the Court of Common Pleas of Lackawanna County, Criminal Division at Nos. CP-35-CR-0001901-2004 and CP-35-CR-0001902-2004

BEFORE: BENDER, BOWES AND COLVILLE*, JJ.

MEMORANDUM: FILED: June 26, 2007

This case is a direct appeal from judgment of sentence. Appellant raises numerous issues, all of which are without merit and/or have been waived. Accordingly, we affirm.

I

A no-adverse-inference instruction explains to the jury that a defendant has a constitutional right to remain silent and that the jury can draw no adverse inference from the decision not to testify. ***See Commonwealth v. Garcia,*** 888 A.2d 633, 634 n.1 (Pa. 2005). In this case, the trial court did not give such an instruction. The court did, however, charge the jury

that a person accused of a crime is not required to present evidence.

Appellant claims that he advised the court of its failure to give the required charge. Specifically, he points to the following exchange that occurred after the jury instructions:

> THE COURT: Any exceptions?
>
> MR. WALKER (APPELLANT'S COUNSEL): Judge, I'm sure you probably didn't, but did you indicate there's no evidence if he doesn't testify? I thought you were going to cover a reasonable doubt, presumption of innocence.
>
> THE COURT: I said that he doesn't have to present any evidence whatsoever.
>
> MR. WALKER: Okay.

N.T., 3/30/05, 208.

We recognize that Appellant's counsel initially questioned whether the court gave the required charge, but he stated, "[O]kay," when the court responded to his question. Based on the aforementioned exchange, it is apparent the court believed its instruction was sufficient to satisfy the no-adverse-inference requirement, and Appellant's counsel, even if initially objecting, nonetheless acquiesced to the court's explanation. Having failed to preserve his objection to the charge, Appellant may not pursue this issue on appeal. ***See*** Pa.R.Crim.P. 647(B).

II

Appellant also complains that the trial court's instruction regarding involuntary deviate sexual intercourse included a misstatement of the testimony and added details not alleged in the criminal information. Appellant has an obligation to demonstrate to this Court when and how issues were preserved. Pa.R.A.P. 2117(c); 2119(e). Appellant points to no place in the proceedings at which he preserved the aforementioned claims, and we have found no such place. Thus, Appellant has waived these contentions.

III

Appellant next raises a double jeopardy claim. The Commonwealth originally charged Appellant with assaulting two victims over a number of different years. There were multiple criminal informations and a substantial number of counts involving various offenses. Appellant filed a pretrial motion alleging that certain charges were barred by the statute of limitations. The court denied Appellant's motion and he proceeded to trial on all charges.

At some point during the trial, the court became concerned that some of the charges were indeed time-barred and instructed the Commonwealth to review the issue. The Commonwealth then determined that the statute of limitations barred certain charges involving one of the victims. Because the jury had heard evidence involving both victims, the court decided to Grant a mistrial as to all charges.

Appellant filed a motion to bar his retrial. He essentially alleged that the prosecution had engaged in misconduct by proceeding with charges when the Commonwealth knew the charges were time-barred. The court held an evidentiary hearing on this matter and subsequently denied relief. Appellant again proceeded to trial, was convicted and subsequently filed this appeal.

The prohibition against double jeopardy bars retrial where prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial and/or where the misconduct is intentionally undertaken to prejudice the defendant to the point of a denial of a fair trial. ***Commonwealth v. Chmiel,*** 777 A.2d 459, 464 (Pa. Super. 2001). It is important to recognize that not all prosecutorial misconduct precludes a retrial. ***Id.*** Rather, the misconduct must be so egregious as to involve the aforementioned intentional unfairness. ***Id.*** Therefore, to determine whether misconduct was sufficient to prevent a retrial, this Court must analyze the particulars of the prosecutor's behavior. ***Id.*** at 464-66.

It is an appellant's obligation to persuade us that there were trial court errors and that relief is due because of those errors. ***Commonwealth v. Love,*** 896 A.2d 1276, 1287 (Pa. Super. 2006). To do so, he must develop arguments, setting forth relevant law with citations, and explaining how that relevant law applies to the actual facts of the case. ***See Commonwealth v. Irby,*** 700 A.2d 463, 464 (Pa. Super. 1997). Factual discussions must include citations to the

place in the record where those facts appear. Pa.R.A.P. 2119(c). Failure to present developed arguments in the aforesaid manner results in waiver of claims. ***Irby,*** 700 A.2d at 464.

Based on the foregoing legal principles, Appellant must, in this case, articulate an argument applying the pertinent double-jeopardy law to the prosecutor's conduct so that we may evaluate the challenged behavior and determine if it was either intended to goad Appellant into asking for a mistrial or designed to cause an unfair trial.

Considerations involving the statutes of limitations in the first trial were, from the outset, complex. The multiple offenses arose at different times and had varying periods of limitations. Additionally, because the sex crimes involved minor victims, there was an issue as to whether an exception to the limitations periods might apply to some or all of the charges. ***See*** 42 Pa.C.S.A. § 5552(c)(3) (tolling the statute for some crimes until the victim's eighteenth birthday). Accordingly, an accurate determination of the applicable statutes required a consideration of each of the pertinent criminal statutes, the date of each offense, the length of the limitations period for each crime, the victims' ages at the time of each offense, the date of each victim's eighteenth birthday, and the statutory provision relating to tolling. On appeal, this Court must consider what the Commonwealth knew on every one of these points and when the Commonwealth knew it.

Appellant's brief sets forth case law relevant to double jeopardy. However, he does not discuss or cite to the particular facts of this case. He does not identify which periods of limitations applied to which charges and does not present us with relevant dates. Consequently, we cannot determine how clear or unclear it may have been that the limitations periods had run on particular charges. Such a determination is essential in evaluating the Commonwealth's behavior.

Appellant offers no insight into the testimony offered at the fact hearing relevant to his double jeopardy motion. We do not know what the Commonwealth knew when. In short, Appellant does not apply the statutes and case law to the facts of his case. Thus, we cannot evaluate whether the Commonwealth acted egregiously, intending to make the first trial unfair, or whether the Commonwealth merely made honest mistakes. We will not develop Appellant's argument for him. ***Commonwealth v. Hardy,*** 918 A.2d 766, 771 (Pa. Super. 2007). This issue is waived.[1]

---

[1] Appellant also contends that the first trial court improperly denied his motion for judgment of acquittal based on insufficient evidence, but, because that court granted a mistrial based on the problems with the statute of limitations, Appellant could not appeal the trial court's ruling on sufficiency. He then argues that he is entitled to pursue his sufficiency claim as part of a double jeopardy argument on this appeal. He points to no place in the record where he preserved [sic] raised this double

(Continued on following page)

IV

Appellant argues that the trial court erred by admitting evidence of prior bad acts pursuant to Pa.R.E. 404(B). Decisions regarding the admission of evidence rest within the trial court's discretion. ***Commonwealth v. O'Brien,*** 836 A.2d 966, 968 (Pa. Super. 2003). This Court may disturb such a decision only if there was an abuse of that discretion, not merely because we disagree with the trial court's ruling. ***Id.***

Evidence of prior bad acts is not admissible to prove action in conformity therewith. Pa.R.E. 404(b)(1). However, such evidence may be admissible for other purposes, including proof of a common plan, scheme or design embracing the commission of multiple crimes so related to each other that proof of one tends to prove the other. ***O'Brien,*** 836 A.2d at 969. A court must consider the details of the various bad acts to decide if they are sufficiently similar to qualify for admission under the common-plan exception to the general exclusion of prior-bad-acts evidence. ***Id.*** Also, even when offered for an acceptable purpose, prior-bad-acts evidence is admissible only upon a showing that its probative value outweighs its potential prejudice. Pa.R.E. 404(b)(4).

In this case, Appellant was accused of committing sex crimes against Victim, then a teenager. The

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jeopardy theory and we have found none. This contention has been waived.

record supports the trial court's findings that Appellant had contact with Victim's parents and that he allowed Victim to perform some type of work at his (Appellant's) home and radio station. Victim also went on over-night trips with Appellant, working on Appellant's balloon crew and sharing a room with other boys and Appellant. Appellant provided alcohol to the boys who went on such trips. During such trips, Appellant engaged in oral and anal sex with Victim.

The trial court permitted the introduction of Appellant's past sexual interaction with five other teenage boys. While the evidence concerning each act was not identical, there were substantial similarities. The boys ranged in ages from roughly twelve to fifteen. They performed work at Appellant's home and/or radio station, and/or in connection with his apparent pastime of hot-air ballooning. With respect to at least four of the minors, Appellant had contact with their parents. Also, at least four of the five minors drank alcohol at Appellant's home and/or in his presence. In all five cases, Appellant had oral sex with the minors. Appellant had anal sex with at least one of them. The events involving the five boys took place at various times from the 1960s through the late 1980s or early 1990s.

The trial court found that the evidence concerning the prior bad acts showed a common plan, scheme or design justifying its admission into evidence. Appellant attempts to distinguish his case facts, arguing, for example, that Victim was fifteen while some of the other boys were not that age. He also

contends that the events in this case took place during ballooning trips while the others generally centered on work at Appellant's home or radio station. Additionally, Appellant notes that most of the prior acts evidence arose in the 1960s, 1970s and 1980s, while this case involved events in the 1990s.

Appellant's attempts to distinguish his case from the prior events do not show an abuse of discretion by the trial court. The minors' ages were quite similar. Appellant established relationships of comfort or confidence with his victims by exploiting his position as a radio personality or his work as a balloonist. Alcohol use by the minors while in Appellant's presence was common to most albeit not all of the evidence. Finally, Appellant manipulated his victims to engage in oral and, at times, other types of sexual activity.

It is true that some of the prior sexual activity took place decades in the past. However, viewed as a whole, the evidence shows a common plan of sexual crimes against minor boys continuing over some forty years.

In light of the foregoing facts, the trial court decided that the prior acts were sufficiently similar to the present case that proof of them tended to prove a common plan, scheme or design.

Undoubtedly, admission of the evidence was prejudicial to Appellant. However, the trial court found that the probative value of this evidence outweighed the potential for prejudice. Based on the

record, we cannot say that the court's decision to admit this evidence was an abuse of discretion – that is, that it involved partiality, prejudice, bias, ill-will or manifest unreasonableness. Appellant's claim fails.

V

Appellant argues the sentencing court's determination that he is a sexually violent predator (SVP) must be reversed for several reasons. First, he asserts that provisions of or relating to Megan's Law II, specifically 42 Pa.C.S.A. § 9795.2 and 18 Pa.C.S.A. § 4915, violate the due process guarantees of the federal and state constitutions by making him subject to an SVP status pursuant to an evidentiary standard of clear and convincing evidence rather than proof beyond a reasonable doubt.

This claim lacks merit. As a standard of proof for the determination of SVP status, clear and convincing evidence is consistent with constitutional due process. ***Commonwealth v. Maldonado,*** 838 A.2d 710, 718 (Pa. 2003).

Appellant also contends that there was insufficient evidence to classify him as an SVP. Specifically, he argues that the Commonwealth's expert did not testify that Appellant is likely to engage in the future in predatory sexually violent offenses. The likelihood of engaging in such behavior is an element of SVP

status that the Commonwealth must prove under 42 Pa.C.S.A. § 9792.[2]

This Court will reverse a determination of SVP status only if the Commonwealth did not present proof sufficient to establish the challenged element(s) by clear and convincing evidence. ***Commonwealth v. Hitner***, 910 A.2d 721, 729 (Pa. Super. 2006). In the course of reaching our decision, we view the evidence and its reasonable inferences in the light most favorable to the Commonwealth. ***Id.***

Testimony from the Commonwealth's expert included the following:

> [Appellant's] age statistically and theoretically should have made him a reduced risk for criminal offending. However, that risk would have been reduced at a much earlier age, around in his 40s if it were to decrease. He continued to offend suggesting statistically he does not meet the trend that somebody would meet to not reoffend, **so he is in that portion of people who continue to**

---

[2] 42 Pa.C.S.A. §§ 9792 defines a sexually violent predator as a person who has been convicted of a sexually violent offense as set forth in section 9795.1 (relating to registration) and who is determined to be a sexually violent predator under section 9795.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.

reoffend into their later ages and is probably not likely to stop.

N.T., 10/04/05, at 28, 29 (emphasis added).

Reading this testimony in the light most favorable to the Commonwealth, we find that the expert did, contrary to Appellant's contention, offer an opinion indicating that Appellant is likely to engage in predatory behavior in the future. During the hearing, the expert also testified that Appellant suffers from a mental abnormality known as paraphilia not otherwise specified. In Appellant's case, this abnormality is a chronic and persistent sexual arousal involving adolescent males that has motivates him to victimize minors.

The grounds for the expert's opinion included the child pornography Appellant was found to possess which reflected sexual conduct between adolescent males. Other supporting facts included Appellant's behavior in promoting relationships with Victim and other minors by presenting himself as a kind and giving person, having them accompany him on overnight trips, allowing them to work on his hot air balloons or at his radio station, and exposing them to alcohol. The expert explained that offering an adolescent victim such opportunities builds a bond between victim and assailant, reduces the victim's resistance to an assault and diminishes the chance of reporting by the victim. Indeed, she opined that Appellant's activities were specifically related to promoting and

maintaining a relationship for the purpose of victimization. We note that such conduct fits the definition of "predatory" set forth in 42 Pa.C.S.A. § 9792.

The foregoing evaluation by the expert embraces considerations of the relationship between Appellant and Victim, Appellant's age, Victim's age, Appellant's mental abnormality, and his overall behavior contributing to the sexual contact with Victim. These factors are all items appropriately considered when making an assessment relative to SVP status. ***See*** 42 Pa.C.S.A. § 9795.4(b)(1).

In sum, the expert testified to sufficient facts and offered a sufficient opinion to support the SVP designation. Appellant's claim fails.

Additionally, Appellant contends that the sentencing court abused its discretion by considering testimony from the Commonwealth's expert when her opinion was not based on facts of record and/or was based on prior-bad-acts evidence.

With respect to the prior-bad-acts evidence, Appellant incorporates his contentions which we have already found to lack merit. Regarding his contention that the expert relied on facts not of record, Appellant does not discuss those facts. Instead, he makes a blanket reference to the expert's report which report lists various documents upon which the expert relied. We find this argument to be undeveloped and, therefore, waived.

Even if this contention were not waived, it would warrant no relief. Appellant's argument seems merely to be that statements in the documents are hearsay and, therefore, the expert should not have been allowed to rely on them. An expert opinion may properly be based on facts otherwise not admissible in evidence if those facts are of the type reasonably relied upon by experts in the relevant field in forming opinions. Pa.R.E. 703. Appellant has not demonstrated that any of the facts or documents forming the basis of the expert's opinion violated Rule 703.

VI

In his next issue, Appellant seeks allowance of appeal to challenge the discretionary aspects of his sentence. To secure such an appeal, an appellant must include in his brief a concise statement of reasons relied upon for allowance of appeal. Pa.R.A.P. 2119(f). The statement must raise a substantial question that the sentencing court's actions were inconsistent with a specific provision of the sentencing code or were contrary to the fundamental norms of the sentencing process. ***Commonwealth v. Malovich,*** 903 A.2d 1247, 1252 (Pa. Super. 2006). When evaluating a request for appeal, this Court will not include or exclude an entire class of questions as necessarily being or not being substantial. ***Id.*** Instead, we look at the particular facts of each case. ***Id.***

It is the appellant's job to articulate in the concise statement how the court's actions violated the

sentencing code. ***Id.*** Indeed, we will not merely accept bald assertions of sentencing errors. ***Id.*** Simply using general phrases (*e.g.*, manifestly excessive) without supporting facts renders a concise statement inadequate. ***Commonwealth v. Hornaman,*** 2007 PA Super 82, 7. Rather, the statement must present a plausible argument, in the factual context of the case, that the sentence contravenes an identified provision or norm of our sentencing law. ***Commonwealth v. Hartle,*** 894 A.2d 800, 805 (Pa. Super. 2006).

If a concise statement appears to raise a substantial question regarding the propriety of a sentence, this Court has discretion to grant allowance of appeal. 42 Pa.C.S.A. § 9781(b). If we do grant an appeal, we will not disturb a sentence absent a manifest abuse of discretion. ***Malovich,*** 903 A.2d at 1252, 1253. An abuse of discretion is not just an error of judgment. ***Id.*** at 1253. Rather, it involves manifest unreasonableness, partiality, prejudice, bias or ill-will. ***Id.***

Appellant's brief contains a concise statement of reasons relied upon for allowance of appeal. The statement contends that Appellant's aggregate sentence (composed of consecutive terms) was too severe to the point of being manifestly excessive. As part of his claim, Appellant asserts that the court did not state sufficient reasons for the sentence and that it stated reasons that were impermissible because they were inconsistent with "statutory provisions and the fundamental norms governing sentencing." Appellant's Brief at 36. He also alleges that the court did

not consider the least restrictive sentence consistent with the rehabilitative needs of Appellant and the safety of the public.

A claim that a sentence is too severe to the point of being manifestly excessive can raise a substantial question regarding the propriety of a sentence. ***Commonwealth v. Mouzon,*** 812 A.2d 617, 624, 625 (Pa. 2002). Likewise, a court's failure to support a sentence by stating sufficient reasons on the record may or may or not deserve an appeal. ***See Commonwealth v. Wilson,*** 2007 PA Super 105, 2 n.4. Similarly, a contention that a court relied on an impermissible factor in sentencing may call for appellate review. ***Commonwealth v. Matroni,*** 2007 PA Super 110, 32. Lastly, claims that a sentencing court failed to consider an appellant's rehabilitative needs and/or that a sentence is inconsistent with the safety of the public may cause this Court to grant allowance of appeal. 42 Pa.C.S.A. § 9721(b). However, with respect to each of these claims, a general assertion thereof will not warrant appellate review unless an appellant identifies facts of his case supporting the claims. ***See Mouzon,*** 812 A.2d at 624-26; ***Matroni,*** 2007 PA Super 110, 32.

The only relevant fact appearing in Appellant's concise statement is the length of his sentence. He does not relate his claim of excessiveness and severity to the circumstances of his case. Appellant gives no indication as to what factors the court did recite at sentencing and/or how those factors were insufficient. He does not identify, in his concise statement, the

impermissible factors upon which the sentencing court relied.

The concise statement suggests that the sentence did not take into account Appellant's rehabilitative needs but it makes no mention whatsoever of what those needs are. The statement does not illuminate the claim that the sentence is somehow inconsistent with considerations of public safety.

We observe, too, that Appellant cites no case law in his concise statement. While claiming that the sentence was inconsistent with "statutory provisions and the fundamental norms of sentencing," he does not cite any statutory provision or articulate the offended norm. Appellant's Brief at 36.

The concise statement does not persuade us that we should grant appeal to consider the sentence in this matter. Accordingly, Appellant's request for allowance of appeal is denied.

Moreover, it is clear that, even if we had granted allowance of appeal, Appellant would be entitled to no relief. The argument section of his brief offers little more in the way of sentencing facts than did his concise statement. For example, the argument portion simply does not explain what particular facts of this case demonstrate why Appellant's sentence is too severe and manifestly excessive. Also, the argument does not even discuss what Appellant's particular rehabilitative needs are.

The argument (unlike the concise statement) does complain specifically that the court relied on retribution as a sentencing factor and contends that retribution is an impermissible consideration. Contrary to Appellant's claim, however, retribution is a valid consideration in this Commonwealth. ***Commonwealth v. Edwards,*** 906 A.2d 1225, 1230 (Pa. Super. 2006); 204 Pa. Code § 303.11(a).

Ultimately, we simply see nothing in the record persuading us that the sentence was manifestly unreasonable or that it resulted from partiality, prejudice, bias or ill-will. Accordingly, there would be no basis to vacate the sentence even if we allowed an appeal.

For the foregoing reasons, we affirm the judgment of sentence.

Judgment of sentence affirmed.

Judge Bowes concurs in the result.

Judgment Entered:

/s/ James D. McCullough
Deputy Prothonotary

Date: _____

J. A02043/07

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DOUGLAS V. LANE,	:	
APPELLANT	:	No. 594 MDA 2006

ORDER OF COURT

The Court hereby DENIES the application filed July 10, 2007, requesting reargument or reconsideration of the decision dated June 26, 2007.

PER CURIAM

DATE: August 28, 2007

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 813 MAL 2007
Respondent	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
DOUGLAS V. LANE,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 9th day of April, 2008, the Petition for Allowance of Appeal is **DENIED**.

COURT OF COMMON PLEAS
LACKAWANNA COUNTY

COMMONWEALTH OF PENNSYLVANIA	x	
-vs-	x	No. 04-CR-1900 04-CR-1901
DOUGLAS V. LANE 04-CR-1902	x	

TRANSCRIPT OF PROCEEDINGS
OF JURY TRIAL

BEFORE: HONORABLE MICHAEL J. BARRASSE

DATE: March 3, 2005

PLACE: Courtroom No. 3
Lackawanna County Courthouse
Scranton, Pennsylvania 18503

APPEARANCES

For the Commonwealth: EUGENE TALERICO, ESQUIRE
MICHELLE OLSHEFSKI, ESQUIRE

For the Defendant: JAMES J. WALKER, ESQUIRE

* * *

[49] do you have, sir?

MR. WALKER: Assuming that the testimony and the record is closed and the Commonwealth has, indeed, rested, not only did the Commonwealth not show that element, that age of the defendant, the victims in this case, Koelsch and Saxton when he was a victim, nobody identified him at all.

MR. TALERICO: I think they did. I think they did several times.

MR. WALKER: No one – no one identified him –

MR. TALERICO: I believe they did several times.

MR. WALKER: – as being the person they referred to as doing this to them. No one pointed him out. There was no type of either formal or informal identification of my client.

MR. TALERICO: I believe they did several times, Your Honor, inferentially and in court.

THE COURT: Anybody directly?

MR. TALERICO: At this point, Your Honor, I can't remember if they did directly. But I think inferentially every single [50] witness did. Every single witness looked at Mr. Lane every time they testified and said, he said, he told me, he told me this, I think at various times.

Again, Your Honor, these are things that are – certainly can be given to the jury in terms of circumstantial evidence and so forth.

MR. WALKER: These are –I'm sorry. If you finished?

MR. TALERICO: I am.

MR. WALKER: These are not things that can survive the demur to the evidence. If it hadn't been presented, then it doesn't go to the jury. So we can't consider what the jury would or would not find. None – none of these witnesses even outside of Saxton and Koelsch identified Mr. Lane in this case.

THE COURT: Anything else?

MR. TALERICO: No, Your Honor.

MR. WALKER: Outside of the general demur that I already lodged, Your Honor.

THE COURT: The specific two at this point are in regard to the I. D. S. I. counts one and two and general demur and the identification [51] of the defendant, correct?

MR. WALKER: Correct, if you didn't include it, the sexual abuse of children whether or not constitutes the definitional aspect of the charge.

THE COURT: The Court ruled on that. At this time, then we will take a – we will give you until quarter of in regard to those issues.

MR. TALERICO: Thank you, Your Honor.

MR. WALKER: May I approach one moment?

THE COURT: Yes.

(A discussion was held off the record at sidebar.)

(A brief recess was taken at this time.)

COURT OF COMMON PLEAS

LACKAWANNA COUNTY

COMMONWEALTH OF PENNSYLVANIA	x	NO. 04-CR-1900
	x	NO. 04-CR-1901
-vs-	x	NO. 04-CR-1902
DOUGLAS V. LANE	x	

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For the Commonwealth: GENE TALERICO, ESQUIRE
MICHELLE OLSHEFSKI, ESQUIRE
Assistant District Attorneys

For the Defendant: JAMES WALKER, ESQUIRE

Lisa M. Graff, RMR
Official Court Reporter

* * *

[3] THE COURT: At this time based upon arguments of counsel, the Court finds that in regard to the four-year, in regard to the NDSI, in regard to the defendant's alleging four years or more than that of the victims in the case, that the testimony of Dan Pregnar establishing a 30-year relationship, and based upon circumstantial evidence, that that in fact will prove to be at least on excess of the four years while not necessarily establishing the exact age of the defendant at the time.

The other motions of the general demur is denied, and so is that in regard to the identity, and at this time we will bring in the jury. Is there any further motions that need to be reviewed?

MR. TALERICO: No, Your Honor.

MR. WALKER: Not at this time, Your Honor. Your Honor, just I would renew the motion for a mistrial, which I made in several motions individually and collectively for the record.

THE COURT: Okay. Thank you.

(WHEREUPON, jury entered the courtroom.)

* * *

107

No. 08-314

Supreme Court, U.S.
FILED
OCT 2 - 2008
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In The

Supreme Court of the United States

DOUGLAS V. LANE,

Petitioner,

v.

STATE OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The Decisions of the Pennsylvania Courts are Consistent with Well-Settled Precedent from this Court and do not Implicate an Irreconcilable Conflict Among the Federal and State Courts 3

II. The Question Presented Does Not Significantly Impact the Administration of Criminal Justice Because the Petitioner's Claim Is Governed by Well-Settled Law 7

III. Since the Question Presented by the Petitioner Is Controlled by this Court's Decision in *Oregon v. Kennedy* the Grant of the Petition Is Neither Warranted Nor Imperative 9

CONCLUSION 10

APPENDIX

Trial Court Opinion dated March 23, 2005 .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) 5

Commonwealth v. Abruzzese, 231 Pa.Super. 157, 331 A.2d 821 (1974) 8

Commonwealth v. Carelli, 291 Pa.Super. 502, 436 A.2d 228 (1981) 8

Commonwealth v. Fisher, 244 Pa.Super. 361, 368 A.2d 762 (1976) 8

Commonwealth v. Gilman, 485 Pa. 145, 401 A.2d 335 (1979) 8

Commonwealth v. Hickman, 309 A.2d 564 (Pa. 1973) 2

Commonwealth v. Kravitz, 161 A.2d 861 (Pa. 1960) 2

Commonwealth v. Rabik, 259 Pa.Super. 456, 393 A.2d 916 (1978) 8

Commonwealth v. Rispo, 222 Pa.Super. 309, 294 A.2d 792 (1972) 8

Commonwealth v. Splain, 242 Pa.Super. 503, 364 A.2d 384 (1976) 8

Commonwealth v. White, 264 Pa.Super. 495, 400 A.2d 194 (1979) 8

Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) 7, 8

U.S. v Larouche Campaign, 866 F.2d 512 (1st Cir. 1989) 7

CONSTITUTIONAL AMENDMENTS

U.S. Const. amendment V 3, 5

U.S. Const. amendment XIV 3

STATUTES

18 Pa. C.S.A. § 6312 1

RULES

Fed. R. Crim. P. 52(b) 8

Pa. R. Crim. P. 575(A)(3) 8

STATEMENT OF THE CASE

Petitioner Douglas V. Lane was charged with committing acts of deviate sexual intercourse with two minor boys. Moreover, Petitioner was charged with possession of child pornography and manufacturing child pornography by taking photographs of each of the two adolescent victims which engaged in a "prohibited sexual act."[1] Furthermore, the Respondent developed evidence that Petitioner had engaged in a thirty-year pattern of grooming and sexually abusing young boys which began in the late 1960s.

At the close of the Respondent's case and in response to inquiries from the trial court, the Respondent concurred that several charges related to the sexual assault of one victim were time-barred.[2] As a result, a number of charges facing Petitioner were withdrawn. The Petitioner also made numerous motions demurring to the evidence and challenging the sufficiency of the evidence proving that Petitioner was the person who committed the crimes charged.

The trial court provided counsel for the parties a brief opportunity to present case law to the court regarding the additional motions and following the

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[1] 18 Pa. C.S.A. § 6312.

[2] A lengthy hearing was held prior to Petitioner's second trial relating to the Petitioner's claim that a second trial was barred on double jeopardy grounds. The trial court dismissed Petitioner's motion finding no intentional misconduct by the prosecution existed thus a second trial was permitted.

recess, all motions made by Petitioner were denied. *See, Commonwealth v. Kravitz*, 161 A.2d 861 (Pa. 1960) (Identification may be proven by direct or circumstantial evidence and may be inferred from the facts and circumstances which are of such a nature as to prove the defendant's guilt); *Commonwealth v. Hickman*, 309 A.2d 564 (Pa. 1973) (same).

Shortly thereafter in the first trial, the Petitioner requested that the Court grant a mistrial. The Respondent concurred with the request and the trial court ultimately granted Petitioner's request for a mistrial based upon the withdrawal of time-barred charges under Pennsylvania's recently changed statute of limitations for sexual offenses. Petitioner then filed a motion seeking to bar re-trial on double jeopardy grounds alleging prosecutorial misconduct related to the statute of limitations issue. The double jeopardy motion made no mention of the Petitioner's current claim that a re-trial should be barred due to the presentation of insufficient evidence at the first trial.

Following the second jury trial, the Petitioner was convicted of several offenses including Involuntary Deviate Sexual Intercourse resulting in the trial court imposing a sentence of fourteen years and three months to thirty years. On direct appeal to the Pennsylvania Superior Court, Petitioner for the first time raised the claim that his second trial was barred by the double jeopardy clause because allegedly insufficient evidence was presented at his aborted first trial.

In two paragraphs of a forty (40) page brief before the Pennsylvania Superior Court, Petitioner

raised the instant double jeopardy claim for the first time. After sharply criticizing Petitioner's lack of development and synthesis of the prosecutorial misconduct/double jeopardy claim, the Superior Court found that the issue was waived. In a footnote, the Superior Court also concluded the insufficient evidence/double jeopardy claim was waived since Petitioner failed to preserve it for appeal.

Following a denial of Petitioner's application for reargument before the Superior Court, the Petitioner unsuccessfully sought discretionary review by the Pennsylvania Supreme Court. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

I. The Decisions of the Pennsylvania Courts are Consistent with Well-Settled Precedent from this Court and do not Implicate an Irreconcilable Conflict Among the Federal and State Courts.

After having successfully requested a mistrial at his first trial, the Petitioner, consistent with decisions of this Court and those below, *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), sought to bar retrial claiming intentional prosecutorial misconduct "goaded" him into requesting a mistrial. Thus, Petitioner claimed, a second trial should be barred by the Fifth and Fourteenth Amendments of the United States Constitution. After an evidentiary hearing on the matter, the trial court found

"[t]here is nothing to indicate the Commonwealth intended to provoke the defendant into requesting a mistrial nor was there any intention whatsoever to deny the defendant a fair trial." *Trial Court Opinion, March 23, 2005, p. 10.* Further, the trial court noted that the '[r]ecord makes it obvious that upon discovery of the Statute of Limitations defect and its impact on the trial that the Commonwealth did everything in its power to insure that the defendant received a fair trial and agreed with the Court and the defendant regarding a mistrial." *Id. at 11.*

Both the procedural posture of the Petitioner's successful request for a mistrial and the substantive claims made therein place limitations on the issues Petitioner may challenge on appeal from a denial of relief under the double jeopardy clause. *Kennedy, supra.* In *Kennedy*, this Court was confronted with the Oregon Court of Appeals decision barring retrial because of prosecutorial misconduct that occasioned the mistrial. *Kennedy,* 456 U.S. at 670, 102 S.Ct. at 2086, 72 L.Ed.2d at 419. Writing for the Court, then Chief Justice Rehnquist reversed the lower court "[b]ecause [the Oregon Court of Appeals] took an overly expansive view of the application of the Double Jeopardy Clause following a mistrial resulting from the defendant's own motion." *Id.*

The *Kennedy* Court noted that "[w]here the trial is terminated *over the objection* of the defendant, the classical test for lifting the double jeopardy bar to a second trial is the "manifest necessity" standard. . . ." *Kennedy,* 456 U.S. at 672, 102 S.Ct. at 2088, 72 L.Ed.2d 421 (emphasis supplied). The rationale

recognizes the clear distinction between cases wherein a defendant ***elects to terminate the proceedings against him*** by seeking a mistrial and those where the defendant does not request a mistrial yet his ability to have a jury finally decide his case interrupted by "manifest necessity."[3]

In situations where a defendant successfully moves for a mistrial, the substantive issues on which a defendant may challenge a second trial are quite narrow. In *Kennedy*, this Court held "[t]he circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him ***are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.***" *Kennedy*, 456 U.S. at 676, 102 S.Ct. at 2092, 72 L.Ed.2d 425 (emphasis supplied). As such, in *Kennedy*, the Court found that since the prosecutor did not intend to "goad" the defendant into requesting a mistrial, "[t]hat [was] the end of the matter for purposes of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution." *Id.* That conclusion is equally applicable here.

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[3] The most common form of "manifest necessity" in granting a mistrial is where a jury is unable to reach a verdict. Therefore, that "manifest necessity" becomes the basis for the grant of a mistrial. *See, Arizona v. Washington*, 434 U.S. 497, 509, 98 S.Ct. 824, 832, 54 L.Ed.2d 717 (1978).

Simply put, the Petitioner's assertion that he is not barred from raising an ancillary double jeopardy claim unrelated to whether the basis for mistrial was intentionally created by the prosecution is without merit. At his first trial, the Petitioner proffered several motions demurring to the evidence presented. After argument and a review of applicable case precedent, each motion, including the claim of insufficient evidence regarding the identity of the Petitioner were denied by the trial court. Subsequent to those denials, the Petitioner sought to extinguish the proceedings and requested a mistrial. The Respondent concurred and the trial court granted the Petitioner's motion.

Pursuant to *Kennedy* and its progeny, following the successful request for a mistrial by a defendant, *the only inquiry* for purposes of Double Jeopardy barring a re-trial is whether the request for a mistrial was occasioned by prosecutorial misconduct designed to force a defendant into requesting a mistrial. In that procedural posture, it is plain to see the efficacy of such a rule. To allow a defendant in such circumstances, following the grant of a defense requested mistrial, to then challenge evidentiary rulings, issues of sufficiency of evidence and other claims when the very same defendant halted the ability to achieve finality on each of those decisions by requesting the termination of the trial defies logic and is contrary to well-settled precedent of this Court.

Despite the Petitioner's claims in Part I of his Petition for Writ of Certiorari, there is no conflict

among the federal circuits or the state courts regarding the principles governing a defendant's ability to appeal claims under the Double Jeopardy Clause following the successful grant of a defense-requested mistrial. The guidelines are narrow and clear in *Kennedy* and they militate strongly against his claim for relief before this Court.

II. The Question Presented Does Not Significantly Impact the Administration of Criminal Justice Because the Petitioner's Claim Is Governed by Well-Settled Law.

As referenced in Part I, the Respondent asserts that the claim for relief set Forth by the Petitioner is governed by this Court's holding in *Oregon v. Kennedy, supra. Kennedy's* holding clearly states that the ***only*** bar to retrial on Double Jeopardy grounds after a successful defense motion for a mistrial is "[w]here the conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial." *U.S. v Larouche Campaign*, 866 F.2d 512, 514 (1st Cir. 1989).

In Part II of his Petition for Writ of Certiorari, the Petitioner relies almost exclusively on the holding of this Court in *U.S. v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), to support his request for the grant of the Writ. However, the Petitioner's reliance on *Olano* is misplaced. *Olano* concerned itself with the appealability of a claim that alternate jurors attended jury deliberations following the presentation

of evidence at trial. The sole issue was whether the defendant waived his right to appeal based upon the presence of the alternates when no objection was made at the trial level. This Court held that under Fed. R. Crim. P. 52(b), the attendance of the alternates was not an error the lower court was authorized to correct. *Olano, supra.*

Ultimately, this Court embarked upon a discussion distinguishing "waiver" and "forfeiture" as it relates to the failure to timely object at trial. *Id.* However, *Olano's* analysis and holding have no relevance here. Although Pennsylvania law dictates that Petitioner did, in fact, waive any challenge to sufficiency of the evidence at the first trial because he failed to raise it before the trial court, Pa. R. Crim. P. 575(A)(3), this Court's holding in *Kennedy* would specifically prohibit disposition of the issue even if it were timely raised.[4] Since the only Double Jeopardy issue permitted to be raised by a defendant who successfully moves for a mistrial prior to re-trial, intentional prosecutorial misconduct creating the

[4] It is well settled in Pennsylvania that the failure to timely raise a double jeopardy claim results in a waiver of that claim. *Commonwealth v. Gilman*, 485 Pa. 145, 401 A.2d 335 (1979); *Commonwealth v. White*, 264 Pa.Super. 495, 400 A.2d 194 (1979); *Commonwealth v. Rabik*, 259 Pa.Super. 456, 393 A.2d 916 (1978); *Commonwealth v. Carelli*, 291 Pa.Super. 502, 436 A.2d 228 (1981); *Commonwealth v. Fisher*, 244 Pa.Super. 361, 368 A.2d 762 (1976); *Commonwealth v. Splain*, 242 Pa.Super. 503, 364 A.2d 384 (1976); *Commonwealth v. Abruzzese*, 231 Pa.Super. 157, 331 A.2d 821 (1974); *Commonwealth v. Rispo*, 222 Pa.Super. 309, 294 A.2d 792 (1972).

need for a mistrial, was raised, litigated and decided by the trial court, the Petitioner's claim must fail.[5]

III. Since the Question Presented by the Petitioner Is Controlled by this Court's Decision in *Oregon v. Kennedy* the Grant of the Petition Is Neither Warranted Nor Imperative.

The question presented by the Petitioner is squarely controlled by this Court's decision in *Oregon v. Kennedy, supra*, and as a result, the grant of the Petition for Writ of Certiorari is not warranted. The Petitioner asserts that his petition should be granted so that this Court may promote clarity in this area of the law. *Respondent's Petition for Certiorari,* p. 15. However, Petitioner fails to acknowledge that this Court has already spoken with clarity on this issue in *Kennedy*.

The Petitioner invites this Court to allow a criminal defendant to use a successful request for a mistrial as both a sword and a shield. As a shield, the successful grant of a mistrial would ostensibly protect the defendant from an unfair verdict or one infected by incurable error. As a sword, the Petitioner suggests after obtaining his requested remedy, a mistrial,

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[5] The Trial Court's Opinion regarding the prosecutorial misconduct/Double Jeopardy claim filed by the Petitioner is attached in the Respondent's Appendix.

he may then litigate any number of perceived errors in the first trial – the one extinguished at his request – to bar retrial. Such tortured logic is patently unfair and runs counter to the holding in *Kennedy*. As a result, the Respondent submits that the grant of the present petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent the Commonwealth of Pennsylvania prays that this Court deny his petition for writ of certiorari.

Respectfully submitted,

EUGENE M. TALERICO, JR.
Counsel of Record
Attorney for Respondent

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
vs.	:	CRIMINAL DIVISION
DOUG LANE	:	04 CR 1900-02

MEMORANDUM OF LAW

BARRASSE, J.

This matter is presently before the Court on the Defendant's Motion to Dismiss Criminal Informations Pursuant to Double Jeopardy Clauses of United States and Pennsylvania Constitutions. The parties and [sic] have filed briefs in support of their respective positions and a hearing was conducted on March 18, 2005 and the matter is ripe for disposition.

FACTUAL BACKGROUND

On two separate occasions the Defendant, Doug Lane ("Lane") was charged by the Pennsylvania State Police and the Lackawanna County District Attorney's Office with multiple counts of sexual offenses. On March 17, 2004, the Defendant was charged with two counts of Involuntary Deviate Sexual Intercourse, 18 Pa. C.S.A. § 3123(a)(5), one count of Corruption of Minors, 18 Pa. C.S.A. § 6301(a)(1), and one count of Indecent Assault, 18 Pa. C.S.A. § 3126(a)(1). The offenses committed upon Scott Saxton are alleged to have occurred between August 1990 and August 31, 1994.

On April 21, 2004, Lane was charged with two counts of Involuntary Deviate Sexual Intercourse. 18 Pa. C.S.A. § 3123(a)(5), seven counts of Sexual Abuse of Children, 18 Pa. C.S.A. § 6312(b), one count of Corruption of Minors, 18 Pa. C.S.A. § 6301(a)(1), two counts of Indecent Assault, 18 Pa. C.S.A. § 3126(a)(1) and (a)(8), five counts of Criminal Attempt to Possess Child Pornography, 18 Pa. C.S.A. § 901, six counts of Possession of Obscene & Other Sexual Materials, 18 Pa. C.S.A. § 5903(a)(3), and one count of Unlawful Use of a Communication Facility, 18 Pa. C.S.A. § 7512. The offenses committed against Jason Koelsch are alleged to have occurred between January 1996 and December 1999. A Preliminary Hearing was held on all charges before District Justice James Kennedy on July 22, 2004 and all charges were held for further court action.

On September 23, 2004, the Commonwealth filed the above referenced criminal informations against the defendant. On October 7, 2004, the defendant waived arraignment and a pretrial conference was conducted. An order listing the relevant dates, including the dates to file notions was issued at that time. The defendant subsequently requested, and was granted, several extensions of time for the filing of motions. On December 10, 2004, the Commonwealth presented Motions in Limine to admit testimony of prior bad acts of the defendant to show common plan or scheme. On February 1, 2005, past the deadlines granted in several extensions, the defendant filed an omnibus pretrial motion for relief.

Prior to the commencement of trial, argument was heard on the parties' motions. The Court denied the defendant's motions and granted the Commonwealth's motion to include evidence of prior bad acts for the limited purpose of showing common plan or scheme.

On February 28, 2005 trial commenced on the above referenced charges. On March 3, 2005, after the close of evidence, the defendant presented a general demurrer to the charges and specifically demurred to charges related to Scott Saxton as being time barred by the applicable statute of limitations. After reviewing the evidence and the applicable statute of limitations, the Court dismissed the following charges as being time barred:

- All criminal charges docketed to 04 CR 1900;
- Counts XII through XV of Criminal Information 04 CR 1901;
- Counts IV through VI of Criminal Information 04 CR 1902.

On March 4, 2005, the defendant motioned for a mistrial alleging that the defendant had been prejudiced by the presentation of evidence of crimes that were time-barred, in particular collateral evidence of sexual relations by the defendant with Scott Saxton in the form of audio tapes of a consensual telephonic intercept of conversations between the defendant and Saxton. The Commonwealth concurred in this motion and the Court declared a mistrial.

The defendant then filed this Motion to Dismiss and Bar Retrial Pursuant to Double Jeopardy. The defendant asserts that the actions of the Commonwealth constituted such an egregious and consistent pattern of prosecutorial misconduct that the retrial of the defendant is barred by the Double Jeopardy Clauses of the United States and Pennsylvania Constitutions.

STATEMENT OF LAW

It is well settled that prosecutorial misconduct may implicate Double Jeopardy under certain circumstances. ***Commonwealth v. Simone,*** 712 A.2d 770, 773 (Pa. Super 1998) *citing with approval,* ***Oregon v. Kennedy,*** 102 S.Ct. 2083, 2091 (1981). "Under both the federal and state constitutions, double jeopardy bars retrial where the prosecutor's misconduct was intended to provoke the defendant into moving for a mistrial." ***Commonwealth v. Chmiel,*** 777 A.2d 459, 464 (Pa. Super. 2001) *citing* ***Oregon v. Kennedy*** *supra* and ***Commonwealth v. Simmons,*** 522 A.2d 537 (Pa. 1987). Our Supreme Court held that the Double Jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant to move for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of a denial of a fair trial. ***Commonwealth v. Smith,*** 615 A.2d 321 (1992); *See also* ***Commonwealth v. Martorano,*** 741 A.2d 1221, 1223

(Pa. 1999). "The double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant subjected to the kind of prosecutorial misconduct intended to subvert a defendant's constitutional rights." ***Chmiel*** at 464. This does not mean that prosecutorial overreaching is a per se bar to retrial. *See* ***Id.***; ***Commonwealth v. Simone,*** 712 A.2d 770 (Pa. Super. 1998).

Even grossly negligent unintentional prosecutorial overreaching will not bar retrial. ***Commonwealth v. Lesko,*** 719 A.2d 217 (Pa.1998.). The Commonwealth must intentionally goad the defendant into moving for a mistrial or specifically undertake to prejudice the defendant to the point of denying him a fair trial for double jeopardy to bar retrial. ***Commonwealth v. Strong,*** 825 A.2d 658 (Pa. Super. 2003). Even intentional prosecutorial misconduct, unless undertaken with the specific intention of depriving the defendant of a fair trial, does not implicate the double jeopardy clause. ***Commonwealth v. Mulholland,*** 702 A.2d 1027, 1033 (Pa. 1997); ***Commonwealth v. Moose,*** 623 A.2d 831, 837 (Pa. Super. 1993) and ***Commonwealth v. Santiago,*** 654 A.2d 1062, 1085 (Pa. Super. 1994). When a defendant successfully moves for a mistrial and prevails before conviction, any prosecutorial misconduct is less likely to subvert a defendant's constitutional rights. ***Simone,*** *supra* at 774.

The Pennsylvania Superior Court has set forth the relevant factors to consider in gauging allegations of prosecutorial misconduct.

> (1) the absence of any actions undertaken by the prosecutor to preserve the trial and to enhance the defendant's prospects for a fair trial after the misconduct occurred, (2) the absence of either abundant or convincing evidence of the defendant's guilt, so that the prosecutor's misconduct might reasonably be perceived as an attempt to rescue an inadequate prosecution, (3) the absence of misconduct causing serious and incurable prejudice to the defendant, (4) the absence of any neutral explanations, including inexperience, trial strategy, or inadvertence on the part of the government, to show that it did not, in fact, act purposely, (5) observations of the trial judge concerning the prosecutor's motives, and (6) defiance by the prosecutor of any direct order or clear admonition by the trial court to refrain from specific conduct prejudicing the defendant's prospects for acquittal.

Commonwealth v. Buffington, 444 A.2d 1194, 1197 (Pa. Super. 1982).

Pennsylvania Courts have on numerous occasions reviewed the application of an amendment extending applicable statutes of limitations and found that the extended time period applies when the amendment occurs before the prior limitation period expired. *See* ***Commonwealth v. Johnson,*** 520 Pa. 165, 553 A.2d 897 (1989); ***Commonwealth v. Morrow,*** 682 A.2d 347 (Pa. Super. 1996); ***Commonwealth v. Lavelle,*** 555 A.2d 218 (Pa. Super. 1989); ***Commonwealth v. Bell,*** 549 A.2d 205 (Pa. Super.

1988); ***Commonwealth v. Harvey,*** 542 A.2d 1027 (Pa. Super. 1988). Conversely, the extended limitation period cannot be applied when the statutory limitation period has already run when the amendment is passed. ***Id.***

The Pennsylvania Rules of Criminal Procedure provide that pretrial requests for relief should be included in one Omnibus Motion. Pa.R.Crim.P. 578. This motion shall be filed within 30 days after arraignment or waiver thereof. Pa.R.Crim.P. 579. The motion shall state with particularity the grounds for the motion, the facts that support each ground, and the types of relief or order requested. Pa.R.Crim.P 575

DISCUSSION

The defendant urges the Court to look at the totality of the Commonwealth's conduct in the investigations and prosecution of this case. The Commonwealth, on the other hand, suggests that the only applicable considerations in determining whether double jeopardy bars retrial is the actions that prompted the successful motion for mistrial. In order to scrupulously protect the defendant's Constitutional rights. the Court will follow the defendant's suggestion and review the entire course of the trial to determine whether there was intentional prosecutorial misconduct and, if so, such conduct bars retrial of the defendant.

The defendant, in his motions and argument, presents a litany of different actions of the Commonwealth that he asserts constitute misconduct, either intentional or grossly reckless. In summary, the actions alleged by the defendant are:

- Inadequate investigation and initiation of prosecution;
- Informations lacking in requisite factual and date specificity;
- Informations defective in duplicative charging;
- ***Brady*** violation in failing to disclose that some of the offenses were time barred;
- Evidence and references to time barred charges (relating to Scott Saxton) were presented and made to jury;
- Video display and references to "40 years of abuse" and "40 years of silence", references to inadmissible evidence and charges all of which were highly inflammatory and prejudicial and far beyond the limited admissibility purpose under Rule 404(B);
- Use of duplicative evidence of time barred offenses (audio tape of telephonic intercepts);
- Elicitation of testimony regarding events occurring after alleged offenses and beyond the time-frame in the information;

- Elicitation of prejudicial testimony beyond scope of proffer and limited admissibility purpose (in particular a witnesses' reference to suicidal thoughts);
- Improper contact with jurors following mistrial and prejudicial impact on potential jury pool for retrial.

The Court has reviewed the actions of the Commonwealth in regards to each of these instances of conduct referenced by the defendant and finds that none of them individually or taken as a whole constitute intentional misconduct by the prosecution. In fact, this Court finds that none of the conduct relied on by the defendant was improper or in error with the exception of the Commonwealth's failure to recognize that some of the charges were time barred by the Statute of Limitations, which is the only issue that even merits discussion. The defendant made several prior motions for mistrial during the trial. These motions were carefully considered by the Court, found to be without merit, and denied. The defendant's claims in that regard are clearly without merit and frivolous.

In regards to the Commonwealth's failure to recognize or notify the defendant of the lapse of the applicable limitations period, the defendant has produced no evidence, direct or even inferential, to indicate this was intentional or intended to prejudice the defendant. If the applicable Statutes of Limitations periods relative to the charges in this case were not a complex issue, then perhaps the defendant

would be able to raise an inference of bad faith. Here. the limitation periods involved a variety of charges with different limitation periods. The crimes alleged involved minor victims prompting the application of tolling of the limitation periods. The complexity of the Statute of Limitations issue is further exacerbated by the subsequent enactment of an extended limitations period applicable to many of the crimes alleged.

42 Pa. C.S.A. §5552 sets forth the applicable Limitations of Time within which prosecution of a criminal offense must commence (Statute of Limitations). The general scheme of the statute sets the limitation period for all crimes unless otherwise provided at two years from when the offense is committed. 42 Pa. C.S.A. §5552(a). The limitation period for enumerated Major offenses is five years. 42 Pa. C.S.A. §5552(b). A separate subsection b.1, enacted June 28, 2002 and effective 60 days later, sets the limitation period for enumerated Major sexual offenses (which includes the charges at issue here) at 12 years from the date the offense is committed. 42 Pa. C.S.A. §5552 (b.1). The statute also provides an exception which states, in pertinent part, that "Any sexual offense committed against a minor who is less than 18 years of age any time up to the period of limitation provided by law after the minor has reached 18 years of age." 42 Pa. C.S.A. §5552(c)(3). It further enumerates the particular crimes to which this exception applies, including those at issue here.

Pennsylvania Courts have repeatedly held that amendments lengthening the limitation period for

which prosecution can be commenced can be applied to crimes occurring before the enactment of the statute. This retroactivity is limited to when the limitation period applying to the crime has not lapsed prior to the enactment of the extended statute of limitation.

At the time that the offenses with which the defendant is charged occurred the previous version of 42 Pa. C.S.A. §5552 was in effect. This version of §5552 was similar to the current law, but differed in that the maximum limitation period for offenses was 5 years for major offenses (prior version §5552(b). The prior version also provided that, for certain offenses against minors, the limitation period did not begin to run until the victim reached the age of 18. Identifying the applicable limitations periods in this case involves a detailed analysis of each offense, the age of the victim at the time, the date that the victim would reach eighteen years of age, the application of the previous limitation period to the victim's eighteenth birthday and the date that the legislation providing the extended limitation period became effective.

At the March 18, 2005 hearing on this motion, First Assistant District Attorney Eugene Talerico, Jr., testified that the Commonwealth believed that the subsequent extension of the limitations period, to a twelve year period running from the minor victims' eighteenth birthday, applied retroactively to all of the charges in these cases. The defendant failed to challenge or contradict this testimony in any way. Attorney Talerico further testified that the Commonwealth

in no way intended to deprive the defendant of a fair trial. He testified that he first became aware of the possibility of an error in the Commonwealth's assessment of the limitations period following the end of the third day of trial, when the parties were contacted by the Court and asked to review the statute of limitations applicable to charges pertaining to Scott Saxton. He testified that he spent several hours researching the issue that evening and came to the conclusion that many of the charge were, in fact, commenced beyond the applications period. He further testified that the next morning he immediately notified the Court and defense counsel and concurred in the subsequent motion to dismiss the time barred charges.

The defendant has clearly produced nothing to indicate that any of the Commonwealth's actions in relation to the Statute of Limitations was intentional, much less the type of intentional misconduct undertaken for the purpose of prejudicing the defendant to the point of depriving him of a fair trial. In the absence of any evidence or facts to create an inference of intentionality, the worst possible characterization of the Commonwealth's error regarding the Statute of Limitation would be "grossly negligent unintentional misconduct", which would still not suffice to bar retrial. *See* ***Lesko,*** *supra*. Furthermore, while the Commonwealth bears the burden of persuasion as to whether a crime was committed within the statute of limitations period, it is the obligation of the defendant to assert this defense in the pretrial omnibus

motion. ***Commonwealth v. Groff,*** 548 A.2d 1237, 1244, 1248 (Pa. Super. 1988). See also ***Commonwealth v. Darush,*** 459 A.2d 727 (Pa. 1983); ***Commonwealth v. Riley,*** 479 A.2d 509 (Pa. Super. 1984). Failure to raise this issue in a timely pre-trial omnibus was a waiver of such claim. ***Id.*** The Pennsylvania Rules of Criminal Procedure provide that pretrial requests for relief should be included in one Omnibus Motion, Pa.R.Crim.P. 578. This motion shall be filed within 30 days after arraignment or waiver thereof. Pa.R.Crim.P. 579. In this case, the defendant was given multiple extensions of time to file his omnibus motion. Despite these extensions, the defendant failed to file this motion within the additional time period allotted to him.

The defendant finally filed his motions on February 1, 2005, over 100 days after his waiver of arraignment on October 7, 2004 and after the deadline for motions granted in the repeated extensions of time. The defendant's motion consisted of eleven specific motions in twenty-three pages of text. One, boilerplate, allegation 61(C) stated: "The charges set forth in the criminal informations are barred by the applicable statute of limitations." In this case, there were twenty-eight distinct counts contained in three separate informations. Many of these charges alleged offenses for which prosecution was commenced well within the limitation period. This allegation clearly fails to state with particularity the grounds for the motion and the facts that support such grounds for relief. See Pa.R.Crim.P 575.

The Court has reviewed the totality of the Commonwealth's conduct, paying particular attention to the relevant factors suggested by the Pennsylvania Superior Court in ***Buffington*** and finds that none of the factors that would indicate prosecutorial misconduct are present, in particular there is nothing to indicate the Commonwealth intended to provoke the defendant into requesting a mistrial nor that there was any intention whatsoever to deny the defendant a fair trial. The mistrial in this case was granted following the Commonwealth's concurrence that they could not establish that certain offenses were committed within the applicable limitations and their subsequent concurrence in the request for mistrial based on their belief that continuing to verdict would be unfair to the defendant following the admission of certain evidence. Contrary to the defendant's assertions that the Commonwealth intended to either provoke a mistrial or prejudice the defendant to the point of denying him a fair trial, the record makes it obvious that upon discovery of the Statute of Limitations defect and its impact on the trial that the Commonwealth did everything in its power to insure that the defendant received a fair trial and agreed with the Court and the defendant regarding a mistrial.

The Court's careful review of the totality of the Commonwealth's actions shows nothing to even remotely indicate intentional misconduct by the Commonwealth and only reveals one instance of what is clearly error. the misinterpretation of the applicable Statutes of Limitations. The defendant failed to

produce any evidence whatsoever or point to any actions that show or even create an inference of intentional wrongdoing by the Commonwealth. The Court finds that the defendant's motion to bar retrial pursuant to the Double Jeopardy Clauses of the United States and Pennsylvania Constitutions is palpably without merit and frivolous. The defendant's motion is therefore **DENIED**.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
vs.	:	CRIMINAL DIVISION
DOUG LANE	:	04 CR 1900-02

ORDER

NOW, this 23rd day of March 2005, **IT IS HEREBY ORDERED AND DECREED** that the above-captioned defendant's Motion to Dismiss Criminal Informations Pursuant to the Double Jeopardy Clauses of The United States and Pennsylvania Constitutions is **DENIED**.

BY THE COURT:

/s/ Barrasse, J.
BARRASSE, J.

108

(3)

No. 08-314

Supreme Court, U.S.
FILED
OCT 17 2008
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In The

Supreme Court of the United States

DOUGLAS V. LANE,

Petitioner,

v.

STATE OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONER 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Haynes v. State, __S.W.3d__ (Tex. Crim. App. 2008 WL 1883463) 3

Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) .....*passim*

Richardson v. U.S., 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984) 5

Smalis v. Pennsylvania, 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986) 4

U.S. v. Bauer, 173 F.3d 862 (9th Cir. 1999) 4

U.S. v. Dintz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976) 5

U.S. v. Huang, 960 F.2d 1128 (2nd Cir. 1992) 4

U.S. v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) 5

U.S. v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) 6

U.S. v. Wallach, 979 F.2d 912 (2nd Cir. 1992) 3

U.S. v. Wood, 950 F.2d 638 (10th Cir. 1991) 5

CONSTITUTIONAL AMENDMENTS

U.S. Const. amends. V .....*passim*

U.S. Const. amends. XIV .....*passim*

TABLE OF AUTHORITIES – Continued

Page

RULES

Rule 606, Pa.R.Crim.P. 4

REPLY BRIEF FOR PETITIONER

1. The Superior Court of Pennsylvania held below that Petitioner's double jeopardy claim, U.S. Const. amends. V and XIV, raised for the first time on appeal, was thus waived. *See,* Pet. App. 6. As noted by Respondent, this decision is completely consistent with Pennsylvania caselaw. *See,* BIO n.4. What Respondent fails to acknowledge, however, is that Pennsylvania and several other jurisdictions are out of step with virtually every U.S. Court of Appeals, and the decisions of numerous other states which hold that some level of review is required when an issue of double jeopardy is first raised in an appellate context. *See,* Pet. 5-12. It is this conflict, and the serious constitutional implications it represents, which are rooted in the question presented by Petitioner in seeking certiorari review. *Id.* at i.

Instead of admitting such a conflict, however, Respondent mistakenly addresses a question *not* raised, namely the applicability of this Court's holding in *Oregon v. Kennedy,* 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982) to the present case. By not reaching the issue presented in the petition, Respondent's brief in opposition is of little value and does nothing to diminish the compelling need for this Court's action. Whether a double jeopardy claim is waived if not raised in the trial court is a question with no definitive answer given the wide and increasingly divergent opinions of state and federal courts. Without this Court's intervention, an unacceptable

and damaging split will only widen, and inconsistent constitutional interpretation be allowed to fester.

In an obvious effort to divert the Court's attention from the compelling question actually raised in this case, Respondent attempts to suggest that the procedural circumstances below render that question moot. Underlying this misguided approach is the fact that Petitioner's first trial ended in a mistrial due to the presentment of charges which were barred by the applicable statute of limitations. *See*, Pet. at 3. Whatever implications there may be for double jeopardy consideration after declaration of a mistrial, those concerns are not raised in the present case. In fact, the double jeopardy aspect of the question at issue here is completely unrelated to the circumstances surrounding the mistrial in Petitioner's first case, and instead focus solely on whether the Superior Court's finding of waiver[1] regarding a completely different species of double jeopardy was constitutionally sound.[2] As such, not only is *Kennedy* irrelevant to the question presented, it is completely inapplicable to this case. While this alone negates the premise of

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[1] Importantly, the Superior Court did *not* invoke *Kennedy* in dismissing the double jeopardy claim at issue in the present question. Pet. App. at 6.

[2] Petitioner raised, at both the trial and appellate levels, a separate double jeopardy claim arising from the trial error which precipitated the mistrial, and was unsuccessful each time. BIO App. 1; Pet. App. 3. This aspect of double jeopardy is *not* implicated in the current question presented.

Respondent's argument, review of *Kennedy* in light of the underlying facts of this case is instructive.[3]

2. In *Kennedy*, this Court addressed a question of the double jeopardy clause's applicability after a defense motion for mistrial is granted, holding that in such a case, retrial is generally not barred unless prosecutorial action intentionally "goaded" the defendant into seeking the mistrial. Because "the procedural posture of [a] case crucially impacts the double jeopardy question," *Haynes v. State*, __S.W.3d__ (Tex. Crim. App. 2008 WL 1883463), it is important to note that although mistrial was ordered in the present case, the underlying facts and the circumstances surrounding the mistrial are so vastly different from those in *Kennedy* as to render that case of no import here.

Unlike *Kennedy*, mistrial in this case came *after* the close of the prosecution's case, and after judgment had been rendered on several defense motions for judgment of acquittal based on the evidence (granting some, denying others), including a specific sufficiency argument related to the failure to identify

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[3] Even if *Kennedy* were applicable here, it is illogical to suggest that one form of double jeopardy protection (i.e., prior acquittal, or as in this case, sufficiency of evidence) cannot occupy the same reviewing stage as a question raised under *Kennedy*. *See, e.g., U.S. v. Wallach*, 979 F.2d 912 (2nd Cir. 1992) (addressing both a *Kennedy* and sufficiency double jeopardy question).

Petitioner.[4] NT (1) Trial March 3, 2005 at 49; NT(2) Trial March 3, 2005 at 3; NT Trial March 4, 2005 at 7. More importantly, however, the mistrial motion was explicitly *conditional*, with Petitioner's then-counsel specifically declaring that it was made "without *waiving any other arguments* . . . " NT Trial, March 4, 2005 at p.6 (emphasis added). Not only did Respondent *not* challenge this assertion, it *concurred* in the mistrial request. *Id.* Neither Respondent nor the trial court itself made any statement nor took any step to diminish the conditional nature of Petitioner's motion, nor suggest in any way that its grant *would* constitute the waiver Respondent now suggests. Instead, the trial court merely declared that "based upon the motion of the defense *and the concurrence* by [Respondent], we will call a mistrial . . . " *Id.* at p.7 (emphasis added).

By attaching a "non-waiver" condition to his mistrial motion, Petitioner preserved his right to seek double jeopardy protection from any further prosecution. *See, U.S. v. Huang,* 960 F.2d 1128 (2nd Cir. 1992); *accord, U.S. v. Bauer,* 173 F.3d 862 (9th Cir.

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[4] While defense counsel's motions were in such varied forms as requests for "dismissal" or "demurrer," Pennsylvania characterizes all such challenges to the sufficiency of evidence at the close of the prosecution's case as motions for "judgment of acquittal." *See,* Rule 606, Pa.R.Crim.P. (Comment). As this Court has noted, judgment at this stage of a Pennsylvania proceeding has significant double jeopardy implications. *See, Smalis v. Pennsylvania,* 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

1999). In making the mistrial motion conditional, Petitioner lent credence to the concept that "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [prosecutorial] error." *U.S. v. Dintz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

If, on the other hand, this non-waiver condition were *not* incorporated into the trial court's order, then the mistrial would have been "declared without [Petitioner's] consent . . . " *U.S. v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), thus thwarting the requirement that without this consent such an order can issue only if supported by "manifest necessity," *id,* likewise inviting a viable double jeopardy challenge. *See, Huang, supra.*[5] In either case, it is simply disingenuous and misleading for Respondent to attempt to deflect attention from the real issue at hand, namely the vast conflict surrounding the constitutional question of whether a double jeopardy claim may be raised for the first time on appeal. Respondent has no answer to that question other

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[5] Given the circumstances in this case, the double jeopardy implications of the insufficient evidence at Petitioner's first trial raise a constitutional question which is both ripe and appropriate for appellate review. *See, U.S. v. Wood*, 950 F.2d 638 (10th Cir. 1991) (distinguishing the circumstances in a case such as the present one, from that in *Richardson v. U.S.*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984), where a "manifestly necessary" mistrial was declared due to a hung jury.)

than to advise this Court that Pennsylvania consistently answers it in the negative.

3. As outlined in the instant petition, the compelling reasons for issuance of the writ remain, especially given the collision of such concepts as "waiver" versus "forfeiture" of constitutionally precious rights which this case represents. *See, e.g., U.S. v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Respondent, by lashing itself entirely to its misplaced *Kennedy* argument, offers no rebuttal to the point that the conflicting positions on the question presented in this case deeply impact the administration of a constitutionally guided criminal justice system. It is neither unimportant, however, nor immaterial to the present case that "wavier" and "forfeiture" have very different meanings, and impact in significantly different ways upon the rights implicated by each. *Id.* ("waiver" of a right does not defer it, but fully "extinguishes" it, where "forfeiture [by] fail[ure to] timely assert[ ] a right . . . does not . . . " *id*). If left untouched by this Court's intervention, the fundamental right to be free from twice being placed in jeopardy will be "extinguished" in the "rule of waiver" states noted in the petition, but given review in those places with conflicting opinions, despite identical procedural circumstances in each. Such a constitutionally insulting circumstance cannot be allowed to stand. Given the simple and stark decision of the court below, *see,* Pet. App. 6, this case remains

the perfect vehicle by which a problem of this magnitude may be addressed and corrected.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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